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IN THE

Supreme Court of the United States

October Term, 1980

No. 80-1377

CASPAR W. WEINBERGER,
Secretary of Defense, et al.,
Petitioners,

—v.—

CATHOLIC ACTION OF HAWAII/PEACE EDUCATION PROJECT, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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Question Presented

Whether, particularly in light of Department of Defense (DOD) regulations providing for preparation of an Environment Impact Statement (EIS), even where information involved may be classified, the United States Court of Appeals was correct in ruling that the Navy must comply with the EIS provisions of the National Environmental Policy Act and prepare an EIS examining the environmental consequences of building facilities, which petitioners admit are capable of storing nuclear weapons, in close proximity to the Honolulu International Airport and two military airports?

TABLE OF CONTENTS

PAGE

Additional Regulations Involved 1

Statement of the Case 3

Summary of Argument 6

ARGUMENT 10

Introduction 10

POINT I—NEITHER THE ATOMIC ENERGY ACT NOR ANY OTHER STATUTE PROHIBITS THE PREPARATION OF THE EIS ORDERED BY THE COURT OF APPEALS ... 13

POINT II—PREPARING AN ENVIRONMENTAL IMPACT STATEMENT CONCERNING STORAGE OF NUCLEAR WEAPONS AT WEST LOCH WOULD NEITHER DIVULGE MILITARY SECRETS NOR HARM NATIONAL SECURITY 18

A. It is not necessary to confirm the presence of nuclear weapons in order to prepare an EIS for West Loch 18

B. Neither the court below nor respondents have asserted that the entire EIS must be public 20

C. There is a substantial body of relevant unclassified information which would permit significant portions of the EIS to be made publicly available and which must be addressed in order to comply with NEPA ... 21

PAGE

D. Even if the West Loch EIS had to be kept entirely classified, NEPA requires that the EIS be prepared and taken into account in making any decision to store nuclear weapons at West Loch 25

POINT III—THE COST OF PREPARING EIS's FOR SITES OTHER THAN WEST LOCH DOES NOT JUSTIFY FAILURE TO COMPLY WITH NEPA 28

CONCLUSION 31

TABLE OF AUTHORITIES

Cases:

City of Davis v. *Coleman*, 521 F.2d 661 (9th Cir. 1975) 20, 24

Concerned About Trident v. *Rumsfeld*, 555 F.2d 817 (D.C. Cir. 1976) 16, 17

Flint Ridge Development Co. v. *Scenic River Ass'n.*, 426 U.S. 776 ..... 13, 17

Hayden v. *National Security Agency/Central Security Service*, 608 F.2d 1381 (D.C. Cir. 1979), *cert. den.*, 445 U.S. 937 21

Life of the Land v. *Brinegar*, 485 F.2d 460 (9th Cir. 1973) 10

Natural Resources Defense Council v. *U.S. Nuclear Regulatory Commission*, 547 F.2d 633 (D.C. Cir. 1976), *rev'd. sub nom.*, *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519 ..... 11, 27

New York Times Co. v. *United States*, 403 U.S. 713 (1971) 16

Totten v. *United States*, 92 U.S. 105 21

PAGE

Trout Unlimited v. *Morton*, 509 F.2d 1276 (9th Cir. 1974) 24, 25, 26

United States v. *Progressive, Inc.*, # 79-1428 and # 79-1664 (7th Cir.) 16

United States v. *Reynolds*, 345 U.S. 1 21

Statutes and Regulations:

18 U.S.C. § 793 15

18 U.S.C. § 798 15

Atomic Energy Act, 42 U.S.C. 2162, 42 U.S.C. 2277 ..... 14, 15, 16

D.O.D. Regulation, 32 C.F.R. 214.6(D)(10) 8, 20, 21, 26

Executive Order 12065, 43 Fed. Reg. 28949 .. 15, 16, 17

Joint ERDA/DOD Nuclear Weapon Classification Guide 7, 15, 18

National Environmental Policy Act, 42 U.S.C. 4321 *et seq* 13

Miscellaneous:

Narrative Summaries of Accidents Involving U.S. Nuclear Weapons, 1950-1980, 15 May 1981, Department of Defense 27

Additional Regulations Involved

Department of Defense Regulation,
32 C.F.R. 214.6(D)(10)

D. ENVIRONMENTAL IMPACT STATEMENT PHASE

10. *Classified Material.* It may be necessary for DoD Components to include classified material in environmental documentation. Classified information in environmental documents shall be safeguarded in accordance with Executive Order 12065 implemented by DoD 5200.1-R (32 CFR Part 159). The requirements for circulation (CEQ 1502.19) and public involvement (CEQ 1506.6) do not apply to classified environmental documents except where segregation of material and circulation and involvement can be accomplished consistently with the provisions of DoD 5200.1-R. When feasible, environmental documents may be organized in such a manner that classified portions can be included as annexes so that unclassified portions can be made available to the public in the normal manner. This normally will not be possible when the proposal itself is classified.

Executive Order 12065, 43 Fed. Reg. 28949 (1978) states in pertinent part:

> SECTION 1. ORIGINAL CLASSIFICATION.
>
> 1-1. *Classification Designation.*
>
> 1-101. Except as provided in the Atomic Energy Act of 1954, as amended, this Order provides the only basis for classifying information. Information may be classified in one of the three designations listed below. If there is reasonable doubt which designation is appropriate, or whether the information should be classified at all, the less restrictive designation should be used, or the information should not be classified.
>
> * * *

3-3. *Declassification Policy.*

3-301. Declassification of classified information shall be given emphasis comparable to that accorded classification. Information classified pursuant to this and prior Orders shall be declassfied as early as national security considerations permit. Decisions concerning declassification shall be based on the loss of the information's sensitivity with the passage of time or on the occurrence of a declassification event.

3-302. When information is reviewed for declassification pursuant to this Order or the Freedom of Information Act, it shall be declassified unless the declassification authority established pursuant to Section 3-1 determines that the information continues to meet the classification requirements prescribed in Section 1-3 despite the passage of time.

3-303. It is presumed that information which continues to meet the classification requirements in Section 1-3 requires continued protection. In some cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information, and in these cases the information should be declassified. When such questions arise, they shall be referred to the agency head, a senior agency official with responsibility for processing Freedom of Information Act requests or Mandatory Review requests under this Order, an official with Top Secret classification authority, or the Archivist of the United States in the case of material covered in Section 3-503. That official will determine whether the public interest in disclosure outweighs the damage to national security that might reasonably be expected from disclosure.

Statement of the Case

This case presents the question of whether the Navy must prepare an EIS in connection with its plan to store nuclear weapons one mile from a major flight path into the Honolulu International Airport and in close proximity to two smaller military airports in an area which is experiencing the greatest rate of population growth anywhere in Hawaii.

In 1975, the Navy prepared an Environmental Impact Assessment (EIA) in connection with its plan to transfer weapons then stored at the Waikele branch of the Lualualei Naval Magazine on the Island of Oahu, Hawaii,[1] to the West Loch branch of the Naval Magazine, in close proximity to the three airports.

Noting that weapons had been stored at West Loch since 1959, the EIA concluded that increasing the number of weapons would have no significant impact on the environment, and thus an Environmental Impact Statement (EIS) was not necessary. The EIA did not, however, take into consideration that the existing weapons were conventional, and that the new weapons would include nuclear weapons.[2]

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[1] Substantial evidence in the record, including but not limited to photographs of weapons, indicates that nuclear weapons were being stored at Waikele. P-47 through P-51 (plaintiffs' exhibits at trial); Affidavit of James Albertini, dated March 16, 1978.

[2] Petitioners have stated that the EIA which is part of this record is the declassified portion of a document prepared in 1975. Brief for the Petitioners, hereinafter, Br. Pet. p. 8. In three years of litigation there has been no assertion by petitioners that the portions of the document which remain classified consider the environmental consequences of storing nuclear rather than conventional weapons, or any of the peculiar hazards created by the proximity of an airport.

In 1978, the Navy prepared a short "Candidate" Environmental Impact Statement (CEIS) concerning the general effects of storing nuclear weapons.

It did not however consider the potential implication of storing nuclear weapons in close proximity to airports, or what might occur if a plane crashed into a storage bunker containing one or more nuclear weapons. Nor did it adequately examine the dangers which result when a nuclear weapon is damaged and plutonium is released in the air. Rather, it tried to ignore those dangers by stating:

> This material will not cause radiological damage to personnel, regardless of one's proximity, if kept outside the body. Petition for Certiorari, Appendix (hereinafter Pet. App.) G, p. 32a.

In March, 1978, this action was filed by several organizations and individuals concerned with protecting the environment and reducing the dangers to residents of Hawaii posed by nuclear weapons.[3] Plaintiffs, respondents herein, sought an order requiring the Navy to prepare an EIS examining the environmental consequences of building nuclear capable storage facilities and storing nuclear weapons at West Loch.

Following a hearing on the merits, the District Court dismissed the case on the grounds that "restrictions of the security classification guides and the Atomic Energy Act" prohibited preparation of an EIS, and that therefore

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[3] Plaintiffs (respondents) in this action are Catholic Action of Hawaii/Peace Education Project; Life of the Land; James Albertini; Ian Yonge Lind; Eileen Belton, Peter Tagalog; Roger Sheetz; Edward Casey and Nora Ogawa. Defendants (petitioners) are Casper W. Weinberger, Secretary of Defense; John F. Lehman, Secretary of the Navy; Admiral Thomas P. Hayward, Chief of Naval Operations; Rear Admiral Stanley J. Anderson, COMNAV Base, Pearl Harbor; and Admiral Donald D. Davis, Commander-in-Chief of the Pacific Fleet.

the Navy had complied with NEPA to the fullest extent possible. Pet. App. D, p. 14a.

On July 17, 1980, the decision of the District Court was reversed by the United States Court of Appeals for the Ninth Circuit stating:

> We conclude that while the district court correctly held that the West Loch project was major federal action, it erred in holding that the Navy has complied with NEPA to the fullest extent possible. We conclude that the EIA and CEIS provided by the Navy are inadequate and that an EIS is required under the provisions of NEPA.

Pet. App. A., p. 7a.

The Navy takes the position that it can neither confirm nor deny the presence of nuclear weapons at West Loch (or anywhere else for that matter). However, under its regulations, the question of whether a facility is capable of storing nuclear weapons is not classified and in the course of this litigation petitioners have stipulated that the new bunkers constructed at West Loch are nuclear capable. As the court below stated:

> the public therefore must assume that at least the possibility exists that nuclear weapons . . . will be stored at West Loch. Pet. App. A., p. 5a.

Nonetheless, petitioners have failed to examine, in the CEIS or elsewhere, the following questions which the court below considered essential to any decision to store nuclear weapons at West Loch:

(1) The risk of nuclear accidents;

(2) the enhancement of that risk by the physical proximity of the airports;

(3) the effects of any nuclear accident upon the surrounding population and environment of Hawaii; and

(4) the effects of continual low-level radiation from the storage of the weapons near populated areas.

Pet. App. A., pp. 3a and 5a.

Summary of Argument

Petitioners have built facilities capable of storing nuclear weapons at the West Loch branch of the Lualualei Naval Magazine, one mile from a major flight path to the Honolulu International Airport and adjacent to two military airports as well. The bunkers are located in the Pearl Harbor area of Oahu, the area experiencing the most rapid population growth on the island.

Despite the fact that a majority of fatal airplane crashes occur on takeoff or landing, petitioners have never prepared an Environmental Impact Statement (EIS) which would examine, among other things, the likelihood of an airplane crashing into the storage bunkers and the resulting injury to people and damage to the environment if such an accident did occur.

When the plan to build nuclear capable bunkers was first formulated, petitioners justified their failure to do an EIS on the basis that weapons were already being stored at West Loch, and thus building more facilities would not constitute a significant impact on the environment. They did not, however, consider the fact that the existing weapons were conventional, and since the new bunkers were to be nuclear capable, they must consider the significant differences in storing nuclear weapons.

After this litigation was begun, petitioners changed their justification for failing to prepare an EIS, claiming that there is a statutory conflict between the National Environmental Policy Act and the Atomic Energy Act, which, they claim, prohibits them from confirming or denying the presence of nuclear weapons in any particular location.

Petitioners' argument fails for several reasons. First, contrary to the petitioners' contentions, the Atomic Energy Act does not prohibit confirming the presence of nuclear weapons. Though once Restricted Data prohibited from disclosure by the Act, that information has been removed from the Act's protections and prohibitions. It is now considered Formerly Restricted Data and governed by an Executive Order which, among other things, expressly indicates that in appropriate circumstances classified information can be disclosed in the public interest.

Even if the specific storage of nuclear weapons were prohibited from disclosure by the Atomic Energy Act, however, failure to prepare an EIS would not be justified. Firstly, it is not necessary to confirm or deny the presence of nuclear weapons to prepare an EIS. The Impact Statement is and should normally be prepared *prior to* a final decision on a project involving major federal action. It is concerned with the environmental effects if a project were to be carried out; it is *not* a definitive statement that it will be. The only information that would be revealed by the preparation of an EIS for West Loch (or any other facility), therefore, is whether the facility is nuclear capable, and that fact is not even classified, let alone prohibited from disclosure by the Atomic Energy Act. Joint ERDA/DOD Nuclear Weapon Classification Guide, Pet. App. H., p. 37a, # 1721.

Repeatedly suggesting in their brief that the court below ordered an EIS, all portions of which would have to be available to the public, petitioners also argue that they cannot prepare an EIS because military secrets concerning numbers and design of nuclear weapons would be disclosed to the public. This argument fails as well. First, because the court below never even suggested that the entire EIS must be made public. Furthermore, petitioners ignore their own regulations which expressly provide that classified information can be placed in classified

annexes which would not be revealed to the public. DOD Reg. 32 C.F.R. 214.6(D)(10).

Finally, there is a substantial body of unclassified information which can be examined in public portions of an EIS such as the number and location of airplane accidents in Hawaii, the likelihood of an airplane crashing into the weapons bunkers, what would happen if a plane did crash into the bunkers, the area over which plutonium would be dispersed if a nuclear weapon were destroyed by fire or conventional explosion, and the effects of that plutonium on human health and the environment.

Preparation of an EIS is designed to accomplish two main purposes: (1) to inform the decision makers about the environmental consequences of contemplated projects so that the ultimate decisions will be informed and knowledgeable; and (2) to involve the public in the decision-making process as much as possible.

Even were every word classified, an EIS would have to be prepared in order to insure that the decision makers do not make decisions on the basis of faulty or incomplete information. Here the goal of public participation in the decision making process is particularly important since the question to be examined is the possibility of storing nuclear weapons at a cite particularly vulnerable to accidents, the consequences of which would be disastrous. Members of the public have a right and a duty to make certain that all relevant factors are examined by decision makers and to take action through the electoral process if they conclude that the decisions, which are so basic to their lives and safety, are made irresponsibly by government officials.

In particular, those who could be directly affected by a decision to store nuclear weapons at West Loch are entitled to as much information as possible concerning the

likelihood of a nuclear accident at West Loch so they can decide whether they wish to risk their lives and those of their children by living in the shadow of a facility designed to store nuclear weapons.

Finally, petitioners contend that if ordered to prepare an EIS for West Loch, they will also have to prepare EIS's for all other nuclear capable facilities as a form of smokescreen so that no one will know where they *really* intend to store nuclear weapons, and that the cost of the additional EIS's would be prohibitive.

First of all, as noted above, the preparation of an EIS for West Loch would not establish that a decision has been made to store nuclear weapons there. It would only reveal the unclassified fact that the site is nuclear capable and therefore, that weapons might be stored there at some unspecified time.

Secondly, it is not clear how many such facilities exist and therefore whether the cost would be so great. If, however, an *adequate* EIS were prepared for West Loch, many of the same calculations could be used for other EIS's and only the unique features of the different locations would have to be given fresh examination. This would, of course, substantially reduce the cost of those additional Impact Statements. Cost is, however, no defense to the requirements of NEPA and can certainly not be considered where the safety of the population of Hawaii is at stake.

Most important, however, when the storage of nuclear weapons is contemplated and nuclear capable facilities are being built, the environmental effects *must* be considered not as a smokescreen, but to insure that potentially disastrous decisions are not being made. There is no legal justification for petitioners' failure to prepare an EIS concerning the effects of storing nuclear weapons at West Loch. Given the possible catastrophic results of storage

at that particular facility, the ruling of the court below must be affirmed and the Na y directed to prepare an EIS without further delay.

ARGUMENT

Introduction

The briefs of both the petitioners and the Pacific Legal Foundation seek to treat this case as though it were a mere abstraction, dealing with a large but unstated number of storage sites and no known dangers to the community and/or environment in which they are located. This case, however, concerns one particular, known storage site, conceded by petitioners to be nuclear capable, the location of which poses extraordinary danger to several hundred thousand people living in the most highly populated of the Hawaiian islands. Because of the proximity of the West Loch storage facility to the Honolulu International Airport, a frighteningly real possibility exists of an airplane crashing into the bunkers on any one of the hundreds of takeoffs and landings which occur there every day.[4] In fact, there have been several accidents in which fully armed military planes have crashed into the ocean in the vicinity of West Loch. P-8, Exhs. B1-B6, C1-C6, and D1-D7. One such accident was described as follows

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[4] Because over 99% of all passengers travel to and from Hawaii by airplane, Honolulu International Airport has been described as the state's "principal gateway." In addition, it is the third largest point of entry for international arrivals in the United States. In times of labor disputes involving sea transport, aircraft becomes the sole means of shipping and receiving cargo as well. In addition, Honolulu International Airport serves military as well as civilian aircraft. In 1971, HIA had over 250,000 takeoffs and landings. That number was projected to nearly double by 1985, causing the airport to function over both hourly and annual capacity levels. *Life of the Land* v. *Brinegar*, 485 F.2d 460 (9th Cir. 1973).

by Howard Morland, a pilot who has made close to 1,000 landings at the Honolulu International Airport over the past 12 years:

> The pilot bailed out exactly abeam and one mile distance from the present site of forty eight nuclear weapon storage bunkers at West Loch. With its engine dead and with no one at the flight controls, the airplane glided straight ahead one mile and crashed into Pearl Harbor channel, narrowly missing the residential area at Iroquois Point. A gust of wind, or a quirk of fate, could have turned the pilotless airplane north toward West Loch. Traveling at close to two hundred miles per hour and weighing 22,000 pounds, the disabled fighter plane loaded with rockets and guided missiles would have destroyed any building it hit.

Joint Appendix (hereinafter J.A.), p. 61.

Assuming a plane were to crash into West Loch storage bunkers containing one or more nuclear weapons, the resulting fire could, at the very least, cause a conventional explosion scattering plutonium throughout a one-hundred square mile area.[5] Plutonium is, of course, one of the most toxic substances known; J.A., p. 101. *Natural Resources Defense Council* v. *U.S. Nuclear*

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[5] According to a study done by Lawrence Livermore Laboratory, "the destruction of a bunker containing several nuclear weapons could scatter tiny but measurable amounts of plutonium downwind over a 100 square mile area . . . within that area roughly fifty miles long and two miles wide—the plutonium contamination of the soil would exceed the plutonium screening level recently proposed by the Environmental Protection Agency as safe for human habitation." Even after clean-up operations, "it would be virtually impossible to render a 100-square mile area completely safe by EPA's proposed plutonium screening level." P-66, pp. 274-275.

Regulatory Commission, 547 F.2d 633, 638 (D.C. Cir. 1976), rev'd on other grounds *sub nom*, *Vermont Yankee Nuclear Power Corp.* v. *National Resources Defense Council*, 435 U.S. 519 (1978). Depending on the wind direction, such as accident could therefore not only cause countless cancer deaths, but could render the entire city of Honolulu, as well as large portions of the remainder of the Island of Oahu, uninhabitable.[6]

The accident described above is, moreover, *not* the worst case accident. The worst accident would be a plane crashing into a weapons bunker (or into weapons being moved from the bunker to an awaiting navy vessel) and causing a full-fledged thermo-nuclear explosion. As even the trial court recognized, such an accident would be "catastrophic". J.A., p. 105. Because a thermo-nuclear explosion is less likely to occur, and because of the true horror of the more likely accident, entailing a conventional explosion and dispersal of plutonium, respondents' case does not rest on the possibility of a nuclear explosion actually occurring.

Despite the overwhelming dangers posed by placing nuclear weapons in such close proximity to a major heavily trafficked airport, the Navy has never even considered, much less examined, as it would have to in an EIS, the likelihood and repercussions of airplane crashes into the storage bunkers.

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[6] According to petitioners' CEIS concerning the storage of nuclear weapons, "this material will not cause radiological damage to personnel, regardless of one's proximity, if kept outside the body." Pet. App. G, p. 32a. However, since plutonium in the air enters the body when we breathe, a witness for respondents stated that the statement in the CEIS constitutes "a cruel deception to the public with respect to a very potent carcinogen" because "it is in fact impossible to keep the plutonium 'outside the body' once it is in the air, water and food supply." J.A., p. 39.

Nor has the Navy examined how or whether it could evacuate the affected population in the event of a nuclear accident in light of the fact that the Honolulu International Airport, "the principal gateway" to the island, would be part of, or on the edge of, the accident site. Unless alternate evacuation plans were developed, any person seeking to leave the island because of an accident at West Loch would have to travel through "the hot spot" to do so. Since no EIS has been prepared, however, none of these problems have been considered.

If a nuclear accident were to occur at the proposed storage site, and it were later recognized that these factors had not been considered because of the refusal of the Navy to prepare an EIS, it is difficult to imagine the national reaction except to say that it would no doubt dwarf the reaction of the American public to Three Mile Island.

POINT I

NEITHER THE ATOMIC ENERGY ACT NOR ANY OTHER STATUTE PROHIBITS THE PREPARATION OF THE EIS ORDERED BY THE COURT OF APPEALS.

In Section 102(2)(C) of the National Environmental Policy Act (NEPA), Congress directed that all federal agencies shall, "to the fullest extent possible", include in every recommendation or report on "major federal actions significantly affecting the quality of the human environment" a detailed EIS. Petitioners do not contest that building the nuclear capable West Loch storage bunkers constitutes major federal action which normally triggers the EIS requirements of NEPA. Rather, citing *Flint Ridge Development Co.* v. *Scenic River Assn.*, 426 U.S. 776 (1976), they seek to justify their failure to prepare an EIS by claiming a statutory conflict between NEPA and the Atomic Energy Act, which, they claim

> . . . prohibits the public disclosure of the fact that a specific military facility is a storage site for nuclear weapons, and of information relating to the design, capacity, and vulnerability of the site and the nature of the weapons stored there. Br. Pet., p. 14.

Petitioners then quote portions of the Atomic Energy Act defining information as Restricted Data under the Act and the criminal penalties for divulgence of such data by government employees.

By its frequent citations of the Atomic Energy Act petitioners seek to create the impression that compliance with the order below would require the government to violate that Act. Nothing could be further from the truth. As respondents demonstrate below, compliance with the court's order does not require the government to confirm that nuclear weapons are stored at West Loch or to release a single word of the EIS. However, even assuming *arguendo* that the result of preparing the statement would be to confirm that nuclear weapons are stored at West Loch and that some parts of the EIS must be made public, neither the Atomic Energy Act nor any other statute prohibits such disclosure.

As petitioners point out in their brief, pursuant to the Atomic Energy Act, the Atomic Energy Commission (now the Secretary of the Department of Energy) is mandated to periodically review data defined as Restricted Data to determine whether the specified information no longer requires the special protection of the Act and need no longer be treated as Restricted Data. 42 U.S.C. § 2162. As the classification manuals provided by petitioners demonstrate, the information at issue here concerning whether nuclear weapons are stored at a particular facility (and other information relating to their storage) has been removed from the category of Restricted Data and is now termed Formerly Restricted Data (FRD). See,

Joint ERDA/DOD Nuclear Weapon Classification Guide, Pet. App. H, p. 37a. What is obscured by petitioners' discussion is that, having been removed from the category of Restricted Data, information concerning the presence or absence of nuclear weapons is thus no longer governed by the provisions of the Atomic Energy Act. Therefore, the criminal penalties in the Act cited by petitioners are inapplicable as well, for they only apply to data which *is* restricted. 42 U.S.C. § 2277.[7]

The information in question regarding the storage of nuclear weapons is now governed, as regards public release, exclusively by Executive Order No. 12065, 43 Fed. Reg. 28949 (1978), pursuant to which specified members of the executive branch can designate information top secret, secret, confidential, or unclassified.[8] Thus,

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[7] Of course, some of the data included in the EIS might still be Restricted Data (in the absence of a finding that it is no longer needed to be protected as Restricted Data). As respondents discuss further below, the disclosure of that information could be prevented by placing it in classified annexes to any public portions of the EIS.

[8] The absurdity of petitioners' effort to argue that some other statute requires the information in question to be kept secret is shown by their inability to decide which statute might be relevant (compare the Petition for Certiorari which, on page 15, relies on 18 U.S.C. § 798, with Petitioners' Brief which cites 18 U.S.C. § 793). Section 798 relates to codes, cryptography and communications intelligence, and bears not even a remote relation to this case. Section § 793 is also inapplicable to this case because it punishes only *unauthorized* disclosure to a person not entitled to receive classified information. It has never been interpreted to bar authorized disclosure of information by senior officials whose authority to disclose information is spelled out fully in the Executive Order, E.O. 12065, *supra*, § 1-1. Thus even information presently classified as secret by the Department of Defense could be declassified and placed in public portions of an EIS. Of course, it if were not declassified, it could be kept in the classified annexes.

though information concerning the presence or absence of nuclear weapons may currently be classified, that designation is *not* statutorily mandated and could at any time be changed by executive decision.

Moreover, contrary to petitioners' claim that ". . . the Navy must err, if at all, on the side of non-disclosure. . ." [9] Br. Pet. p. 23, the Executive Order indicates a preference for making information available to the public stating:

> If there is reasonable doubt which designation is appropriate, or whether the information should be classified at all, the less restrictive designation should be used or the information should not be classified.

Executive Order No. 12065, *supra*, Sec. 1-101.

The Executive Order further establishes that "declassification of classified information shall be given emphasis comparable to that accorded classification." *Id.* at 3-301. Most important here, however, the Executive Order states:

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[9] It is, unfortunately, not unusual for the government to attempt to maintain secrecy relying on what the D.C. Circuit has termed "the overused rubric of 'national defense'." *Concerned About Trident* v. *Rumsfeld*, 555 F.2d 817, 823 (D.C. Cir. 1976). Such claims have often been rejected by the courts, *see, e.g., New York Times Co.* v. *United States*, 403 U.S. 713 (1971), or ultimately abandoned by the government itself. *United States* v. *Progressive, Inc.* #79-1428 and #79-1664 (7th Cir.). It is important to note, however, that petitioners have a contiuing obligation under the Atomic Energy Act to reexamine classified material to determine whether it can be declassified, 42 U.S.C. § 2162, and respondents or other persons would be free to challenge those decisions. There are, of course, established mechanisms such as protective orders and security clearances to enable meaningful litigation of these questions even where classified information is involved.

> It is presumed that information which continues to meet the classification requirements in Section 1-3 requires continued protection. *In some cases, however, the need to protect such information may be outweighed by the public interest in disclosure of the information*, and in these cases the information should be declassified. (Emphasis added).

Id. at 3-303.

Thus, when petitioners argue that they cannot prepare an EIS because they are prohibited by statute from discussing a specific nuclear weapons storage site, they are *doubly in error* since the statute in question no longer governs the relevant information, and the Executive Order which does, expressly states that the public interest can be determined to outweigh the needs of secrecy.[10]

As the respondents demonstrate more fully below, petitioners' attempt to rely on the Atomic Energy Act to avoid compliance with NEPA fails for an additional reason: it is not, in fact, necessary to confirm or deny the presence of nuclear weapons in order to prepare an EIS for West Loch.

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[10] Furthermore, as the Court of Appeals pointed out in *Concerned About Trident* v. *Rumsfeld*, *supra*, in December, 1970, the Navy issued the first of a series of instructions implementing NEPA provisions. As the Court stated, "By issuing such directions the Department of Defense—Navy bound itself to comply with the substance of the Act." (citations omitted) 555 F.2d at 824.

POINT II

PREPARING AN ENVIRONMENTAL IMPACT STATEMENT CONCERNING STORAGE OF NUCLEAR WEAPONS AT WEST LOCH WOULD NEITHER DIVULGE MILITARY SECRETS NOR HARM NATIONAL SECURITY.

Having eliminated the Atomic Energy Act as an obstacle to the preparation of an EIS for West Loch, there remain petitioners' contentions that Joint ERDA/DOD Nuclear Weapon Classification Guides barring disclosure of the presence of nuclear weapons preclude an EIS, and that preparation of an EIS would result in divulging other military secrets. In fact, neither contention justifies the failure of the Navy to prepare an EIS.

A. It is Not Necessary To Confirm The Presence Of Nuclear Weapons In Order To Prepare An EIS for West Loch.

Since an EIS should be prepared *prior to* a final decision concerning the major federal action (here the storage of weapons), compliance with the order of the Court below would not confirm the presence of nuclear weapons at West Loch and thus would not violate the Joint ERDA/DOD Nuclear Weapon Classification Guide curbing acknowledgment of actual storage of weapons. The only fact that would be revealed by preparing an EIS is whether the storage facility were nuclear capable. That, of course, has been admitted by petitioners in this case, J.A. p. 18, and, according to the Classification Guide, is *not* classified information. Pet. App. H., p. 37a, # 1721. Thus preparation of an EIS would not reveal any information not already public and could not injure national security.

As the Court below correctly pointed out, when storage bunkers are nuclear capable,

> The public . . . must assume that at least the possibility exists that nuclear weapons, to the extent of the apparent capacity of the facility (assuming that capacity would be apparent to a knowledgeable observer) will be stored at West Loch. Thus, an EIS dealing with the consequences of such possibility would reveal nothing with respect to the likelihood of storage of which the public is not already aware. Such a process of informing the decision maker need not imply that the decision has already been made or what the decision is; the Secretary need never reveal the fact that a decision has been made or what it is. However, the public must receive some assurance, particularly on a situation as potentially catastrophic as this one, that when the decision is made the decision maker will have been adequately informed as to the environmental consequences of each alternative, here including the potential consequences of the storage of nuclear weapons at this particular site.[11]

Pet. App. A., p. 5a.

Of course, the purpose of the EIS is not to establish that weapons are or will be present but rather to determine what consequences might flow *if they were.*

Even if the EIS were prepared after the fact because of lack of timely compliance, as here, it would *not* be

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[11] Similarly, should an airport contemplate building a runway large enough to accomodate jumbo jets, even before a decision is made to permit the landing of those oversize jets, an EIS must be prepared examining, among other things, the potential environmental consequences of actually having the jumbo jets use the runway.

necessary for petitioners to state whether or not the weapons have in fact been placed in the completed bunkers, but merely the possible consequences if they were there.

To the extent described above, the EIS would be examining "hypothetical" consequences of a proposed action. But in so doing, it would be no different from other Environmental Impact Statements which examine the consequences of proposed actions; such proposed actions and their consequences by definition are "hypothetical". There is surely no theoretical distinction between an EIS which asks "What would be the possible environmental consequences if a freeway exchange were built in a particular location?", as in *City of Davis* v. *Coleman*, 521 F.2d 661 (9th Cir. 1975), and another which asks "What would be the possible environmental consequences if nuclear capable storage bunkers were built in a particular location?" Petitioners seek to suggest that the EIS mandated by the Court below is some new species of EIS not envisioned by NEPA. Since all EIS's deal with "hypothetical" proposed actions and their consequences, the EIS mandated by the Ninth Circuit in this case is no different from what petitioners term a "standard EIS". Br. Pet., p. 24.

B. Neither The Court Below Nor Respondents Have Asserted That The Entire EIS Must Be Public.

Petitioners' repeated contention that classified military information would be revealed if they were to prepare an EIS in compliance with NEPA, is based, in part, on the erroneous contention that the decision of the court below requires that the entire EIS be available to the public. At no time during this litigation have respondents asserted that the entire EIS must be available to the public. Only those portions which are unclassified would be publicly available. It is abundantly clear that DOD regulations themselves contemplate the preparation of EIS's which include both public portions and classified annexes which are not available to the public. 32 C.F.R. § 214.6(D)

(10).[12] Nonetheless, petitioners repeatedly pose the question at issue here *as though* compliance with the mandates of NEPA and the opinion of the Ninth Circuit required that the *entire* EIS be public. That is plainly not the case. The cases cited by petitioners for the principle that the interests of secrecy can, in some circumstances, outweigh the adversary process are therefore irrelevant to this case.[13]

C. There Is A Substantial Body Of Relevant Unclassified Information Which Would Permit Significant Portions Of The EIS To Be Made Publicly Available And Which Must Be Addressed In Order To Comply With NEPA.

Petitioners have also argued that

> . . . The publicly available portion of a partially classified hypothetical EIS undoubtedly would, in most instances and respects, be incomprehensible, or would be so abstract, general and incomplete as to be of no appreciable benefit to Congress, sister agencies, or the general public.

Br. Pet. p. 23.

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[12] That regulation, cited previously by both petitioners and respondents as 32 C.F.R. 214.8(i), states in pertinent part:

> When feasible, environmental documents may be organized in such a manner that classified portions can be included as annexes, so that unclassified portions can be made available to the public in the normal manner.
>
> DOD Reg., 32 C.F.R. 214.6(D)(10)

Although there have been minor changes in wording in the DOD regulation, those changes have no bearing on respondents' arguments herein.

[13] See, petitioners' reliance on *Hayden* v. *National Security Agency/Central Security Service*, 608 F.2d 1381, 1385 (D.C. Cir. 1979), *cert. denied*, 445 U.S. 937 (1980); *United States* v. *Reynolds*, 345 U.S. 1 (1953); *Totten* v. *United States*, 92 U.S. 105 (1875).

In fact, however, several of the questions which the Court below said the Navy must examine in an EIS and which go to the heart of determining the likelihood of an accident resulting in the dispersal of deadly plutonium, can be addressed on the basis of virtually all unclassified information which is totally independent of classified information.

On the basis of unclassified data, an EIS could examine the likelihood of an airplane crashing into the West Loch bunkers on takeoff or landing. Although it seems incredible that this question would not be examined prior to a decision to store nuclear weapons in the shadow of a major heavily trafficked international airport, it has not been. An "accident potential zone" [14] can be calculated for the Honolulu International Airport, and in fact such a calculation has been proposed by both the state of Hawaii and airport officials but has never officially been done. Preparation of an accident potential zone is particularly important because a substantial percent of airplane accidents occur during takeoff and landing.[15]

Such an accident potential zone was calculated for the Honolulu International Airport by a witness for respondents, extrapolating from official calculations for such a zone for a neighboring airport. According to his calculations, the West Loch bunkers are within the area of high vulnerability to airplane accidents. Tr. pp. 27.

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[14] An accident potential zone is "a rough measure of the risk that an airplane will crash on a piece of ground." Transcript of Proceedings, March 5, 1979, hereinafter, Tr. p. 27.

[15] According to the National Transportation Safety Board, in 1972-76, takeoffs and landings accounted for 32% of all airplane accidents and *60% of all fatal accidents.* National Transportation Safety Board, Annual Review of Aircraft Accident Data, 1976, J.A. p. 71.

Even petitioners' own classification expert indicated at trial that many facts bearing directly on the key issue of risk, which is central to this litigation, are not classified. For example, the numbers or locations of airplane accidents in Hawaii (information essential to the calculation of an accident potential zone) are not classified. J.A., p. 22. The classification expert indicated that information concerning what would happen to a plane when it hit the ground, J.A., p. 25, the number of nuclear accidents, J.A., p. 22-3, the fact of a nuclear accident, Tr. pp. 216, 223, and factors concerning the dispersal of plutonium, J.A., p. 24,[16] all involve unclassified information which is independent of classified information.

Although petitioners err by repeatedly formulating this case as though it both assumes and requires that the *entire* West Loch EIS be public, the principle of maintaining all feasible public involvement must not be overlooked. For without open examination of these and other unclassified matters, members of the public will be deprived of the basic information they need to make critical decisions concerning their own safety and security and to be an informed electorate.

For example, persons who are now living in or contemplating moving to the fast growing Pearl Harbor area,

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[16] Lest petitioners claim that this could not be done without divulging secrets regarding the design of nuclear weapons, we need only point out that it is common knowledge, and even the Navy's own CEIS implies, that most nuclear weapons contain plutonium. *See* Pet. App. G, p. 32a. It is further common knowledge within the scientific community that a minimum of 300 grams of plutonium is necessary to trigger the weapon. Tr. p. 10. Therefore, at the very least, petitioners could continue the explorations begun by Lawrence Livermore Laboratory to determine the effects of an accident in which a conventional explosion or fire resulted in a dispersal of at least 300 grams of plutonium.

where West Loch is located, might wish to reconsider these plans if an EIS determined that there was a significant probability of an airplane crashing into one of West Loch's nuclear capable bunkers. Understandably, they might not wish to live and raise a family where there is a real possibility of a serious nuclear accident.

That same information would also be important to decision makers on a state and local level who might conclude they must accelerate plans to build a general aviation airport in order to decrease traffic in and out of Honolulu International Airport and therefore, hopefully, decrease the possibility of a nuclear accident.

Finally, public examination of those questions is essential in order to fulfill the goals of the EIS requirements of NEPA, "to provide the public with information on the environmental impact of a proposed project as well as encourage public participation in the development of that information." *Trout Unlimited* v. *Morton*, 509 F.2d 1276, 1282 (9th Cir. 1974); *City of Davis* v. *Coleman*, 521 F.2d 661 (9th Cir. 1975).

For as the Court below noted:

> While courts are reluctant to second-guess an informed decision maker as to what is or is not in the public interest, an informed electorate need not be reluctant. For this reason, it seems to us to be important that the public be informed where, as here, disclosure can be so conditioned as not to impinge on the national security. Otherwise, agencies would be able to escape the consequences of the political process as it may operate on an unpopular decision by concealing from the public

the fact that such a decision has been or may be made.[17] Pet. App. A. pp. 6a-7a.

D. Even If The West Loch EIS Had To Be Kept Entirely Classified, NEPA Requires That The EIS Be Prepared And Taken Into Account In Making Any Decision To Store Nuclear Weapons At West Loch.

In addition to the purposes discussed above, the EIS requirements of NEPA are also designed to insure that decision makers have full knowledge of the environmental consequences before making a final determination whether to proceed with a project. As the Court stated in *Trout Unlimited* v. *Morton, supra*, the EIS ". . . should provide decision makers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in light of its environmental consequences." 509 F.2d at 1282.

Thus, even were it necessary for the *entire* EIS to be *classified*, and therefore not available to the public, an EIS must nevertheless be prepared assessing the environmental effects of storing nuclear weapons at West Loch. In fact, petitioners' own regulations expressly recognize that principle. In subsection 10 of Section D. Environmental Impact Statement Phase, the regulations specifically refer to situations ". . . when the proposal itself

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[17] Should petitioners respond that public participation in any decision making concerning the placement of nuclear weapons is somehow inappropriate, one need only look to the considerable public participation in decisions concerning the existence and location of the MX missile system and the ultimate rights of the electorate to remove from office those persons who it believes have placed weapons in locations which are contrary to the public interest.

is classified." 32 CFR 214.6(D)(10). Petitioners seek to wish away this regulation by arguing that:

> . . . the crucial question is not whether the Navy must or will comply with NEPA insofar as that statute compels *decisionmakers* to take specified steps to inform themselves of, and take into account, the environmental consequences of the actions they propose. Br. Pet. p. 13.

That, however, is *exactly* the issue in this case. For as the Court below stated: ". . . the decision maker must be so informed as to the consequences of each alternative that a knowledgeable choice can be made." Pet. App. A. pp. 4a-5a; see also, *Trout Unlimited* v. *Morton, supra.* Here, the frightening fact is that although the West Loch bunkers are nuclear capable, and although they were built to house weapons from Waikele (which even respondents knew were nuclear weapons), the decision maker *has not* examined how dangerous it would be to store nuclear weapons at West Loch. Rather, the Navy has prepared an Environmental Impact Assessment (EIA) and a "Candidate" Environmental Impact Statement (CEIS), neither of which examines the questions necessary to inform a decision maker concerning the dangers of storing nuclear weapons at West Loch. The EIA indicates conventional weapons have previously been stored at West Loch. It never mentions nuclear weapons, however, or the special dangers, such as radiation, which they involve. Pet. App. F, pp. 17a-26a. The CEIS states that:

> A rupture of the nuclear warhead [resulting in the release of radioactive material] is extremely unlikely since the warhead is designed to withstand considerable impact. Tests had (sic) confirmed that warheads will remain intact when dropped from heights much greater than those normally experienced in actual handling operations.

And that although

> . . . in the event of a high explosure (sic) detonation, some plutonium material could be spread about the immediate area of the accident, this material will not cause radiological damage to personnel, regardless of one's proximity, if kept outside the body.

CEIS, Pet. App. G, p. 32a.

It does not, however, even examine a nuclear warhead would rupture and plutonium disperse as a result of an airplane crash (as occurred in Palomares, Spain and Thule, Greenland)[18] or just how residents of Hawaii would keep plutonium out of their bodies since it is taken into the body by breathing. *See*, footnote 6, p. 12, *supra*. Moreover, plutonium is so toxic that ". . . inhalation of a single microscopic particle is though to be sufficient to cause cancer." *Natural Resources Defense Council* v. *U.S. Nuclear Regulatory Commission*, *supra*, 547 F.2d at 638; see also, J.A. p. 34.

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[18] When a B-52 and a KC-135 collided over Palomares, Spain, two of the four nuclear weapons carried by the B-52 exploded on impact with the ground, releasing radioactive materials. Approximately 1,400 tons of radioactive soil and vegetation were removed for storage in the United States. In 1968, a B-52 crashed and burned approximately seven miles from a runway while approaching the Thule Air Force Base to land. All four nuclear weapons on board were destroyed by fire, which resulted in contamination of sea ice. "Some 237,000 cubic feet of contaminated ice, snow and water, with crash debris, were removed to an approved storage site in the United States over the course of a four-month operation." *Narrative Summaries of Accidents Involving U.S. Nuclear Weapons, 1950-1980*, 15 May 1981, Dept. of Defense. In addition to those accidents, in 1950 a B-29 carrying a weapon crashed during takeoff from what is now Travis Air Force Base in California. The fire from the burning plane was fought for 12 to 15 minutes before the weapon's high explosive material detonated. (*ibid*).

Thus, obviously the decision maker here has never been adequately informed to make a knowledgeable and therefore rational determination whether nuclear weapons can be *safely* stored at West Loch. That, of course, is one of the fundamental purposes of an EIS.

POINT III

THE COST OF PREPARING EIS's FOR CITES OTHER THAN WEST LOCH DOES NOT JUSTIFY FAILURE TO COMPLY WITH NEPA.

In a last ditch effort to avoid preparing an EIS for the concededly nuclear capable bunkers at West Loch, both petitioners and the Pacific Legal Foundation argue that were a West Loch EIS prepared, smokescreen EIS's would also have to be prepared for every other nuclear capable storage site, at the cost of millions of dollars.

For they claim,

> ". . . if hypothetical EIS's were prepared and disseminated only for those facilities where nuclear weapons in fact are stored, the EIS would serve as a kind of paper signpost advertising the site's existence and purpose." [19] Br. Pet. p. 24.

As respondents pointed out above, however, the preparation of an EIS need not, and should not, signify that nuclear weapons are present at a particular location, since it should be prepared prior to the final decision con-

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[19] Petitioners go on to argue that ". . . EIS's would have to be prepared not only for facilities actually capable of storing nuclear weapons, but for facilities perceived to have that capability as well . . . ." Br. Pet., p. 24. In so arguing, they are doubtless forgetting that the fact that a facility is nuclear capable is not classified information and therefore already publicly available information. See discussion, p. 18, *supra*.

cerning storage. See, point IIA, pp. 18-20, *supra*. If an EIS must be done for West Loch, it is not because nuclear weapons "in fact are stored" there, but because the facility is nuclear capable and the weapons might one day be stored there. If EIS's must be done for other nuclear capable facilities, they must be done not as smoke-screens for a West Loch EIS, but to inform decision makers (and, to the extent possible, the public) whether or not nuclear weapons can be safely stored in those other nuclear capable locations.[20]

It must be noted, moreover, that nowhere in the record is there any indication of how many nuclear capable storage sites exists.[21] Therefore, there is no basis to assume that the cost of preparing EIS's for all nuclear capable storage sites, which would involve many of the same calculations, would even be burdensome, let alone prohibitive.

It must also be noted that since whether a storage site is nuclear capable is *not* classified information, the *number of nuclear capable facilities* could be made public.

Storing nuclear weapons in locations which are unusually danger prone, and which have particularly high population density, such as the West Loch area, without fully examining the environmental consequences is, at best, highly irresponsible. As respondents have noted above, if Americans are to live without the constant danger and concomitant fear of cataclysmic accidents in their own backyards, such EIS's must be done. The cost

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[20] This, of course, assumes that each of those other storage sites, like West Loch, constitutes "major federal action" since the EIS provisions of NEPA are triggered by "major federal action."

[21] Because the financial argument was first raised by petitioners in this Court, that information was never sought by respondents in discovery or otherwise made part of the record herein.

of such an undertaking could, however, be substantially reduced if an adequate "candidate" or generic EIS were prepared rather than the totally inadequate one that exists now.[22] Then, the EIS for any specific location would only need to explore the unique features of that location.

However, even assuming there will be some cost of impact statements necessary to protect the safety of our people and environment, those costs are not a defense to the requirements of NEPA. Moreover, respondents and Pacific Legal Foundation would surely rather have that money spent now on studies which could prevent tragic accidents from occurring rather than paying later for the removal of contaminated land and for compensation to the people of Hawaii for their illnesses and deaths.

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[22] An adequate generic EIS could fully examine the hazards common to all nuclear weapons storage such as dispersal of plutonium resulting from a fire. It could also consider special, though not unique, hazards such as storage near airports, earthquake faults, nuclear reactors, large population centers, etc. The generic statement could, for example, consider the minimum safe distance between nuclear storage facilities and airports of various sizes and traffic densities, and examine what would occur if a plane crashed into a bunker containing nuclear weapons or weapons being transferred into a vehicle. This would leave to the site-specific EIS questions as to local wind patterns, possible escape routes in case of accident, etc. A West Loch EIS, for example, must examine whether evacuation of the island of Oahu would be possible in the event of a nuclear accident.

CONCLUSION

For all the foregoing reasons, respondents urge this Court to affirm the ruling of the Court below and direct the Navy to prepare an Environmental Impact Statement for West Loch without further delay.

Respectfully submitted,

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